

No. 82-1355

Office Supreme Court, U.S.

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IN THE
SUPREME COURT OF THE UNITED
October Term, 1982

CORNELIA DEROIN YELLOWFISH, STELLA DEROIN
ROWE, WILLENE DEROIN ROSS, CLARICE DEROIN
RICKMAN, WILMA DEROIN GUOLADDLE, PEARL H.
DEROIN MCKINNEY, LILLIAN CARSON MORGAN, LENA
SHADLOW BLACK, LOUIS (LEWIS) PETERS,

Petitioners,

vs.

CITY OF STILLWATER, OKLAHOMA, AND THE
UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

Opposing Brief of Respondent,
City of Stillwater, Oklahoma

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Stillwater, Oklahoma

March, 1983

QUESTIONS PRESENTED FOR REVIEW

1. Whether 25 U.S.C. Sect. 357 which authorizes the condemnation of Indian trust allotments has been partially displaced by 25 U.S.C. Sect. 323-328 which authorizes the Secretary of the Interior and Indian landowners to consent to right-of-ways across trust allotments.

2. Whether the United States, by taking the position in this case that 25 U.S.C. Sect. 357 is not partially displaced by 25 U.S.C. Sect. 323-328, acted outside the scope of its trust duties to the Indian allottees, and breached its trust responsibilities.

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties.

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OPPOSING BRIEF OF RESPONDENT,
CITY OF STILLWATER TO PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

The Respondent, City of Stillwater,
Oklahoma, respectfully prays that a writ of
certiorari to review the opinion of the
United States Court of Appeals For the Tenth
Circuit entered in this proceeding on April
28, 1982, be denied.

OPINIONS BELOW

Respondent agrees with Petitioners' statement thereof.

JURISDICTION

Respondent agrees with Petitioners' statement thereof.

STATUTES INVOLVED

Respondent agrees with Petitioners' statement thereof.

STATEMENT OF THE CASE

Respondent deems it necessary to call the Court's attention to the last paragraph of the opinion complained of "APPENDIX A", App. 11-12 to Petitioners' Brief which reads:

"Even if the Government needed to demonstrate why right-of-way condemnations are in the best interest of Indians, we are persuaded that the Government adequately made such a showing in oral argument. If

condemnation is not permitted, a single allottee could prevent the grant of a right-of-way over allotted lands for necessary roads or water and power lines. Moreover, Indian allottees benefit as much from public projects as do those non-Indian property owners whose land is interspersed with the allottees' land".

REASONS FOR NOT GRANTING THE WRIT

The Petitioners have not shown special and important reasons of the character described in Rule 17 of this Court to grant review on certiorari.

1. 25 U.S.C. Sect. 357 and 25 U.S.C. Sect. 323-328 are not, irreconcilable but provide alternate methods of acquiring rights-of-way across lands which have been allotted in severalty to Indians.

For all practical purposes, lands so allotted are private property with the owners having the full beneficial use thereof. Such lands have never been considered as property appropriated to a public use. Petitioners seek to have such allotted lands placed in a separate class,

untouchable for public improvements without the joint consent of the Secretary of Interior and the Indian Owner. Under this theory, highways, electrical transmission lines, pipe lines and all other public improvements could not be constructed without consent. Oklahoma is spotted with restricted lands held in trust for Indian Allottees. If Congress had intended this result, it would have made its meaning clear, United States v. Oklahoma Gas and Electric Company, 318 U.S. 206 (1943). Other authorities cited in the opinion complained of, clearly show the invalidity of the Petitioners' assertions.

2. Review is inappropriate in this case because interpretation of 25 U.S.C. Sect. 357 and 25 U.S.C. Sect. 323-328 by the Federal Courts of Appeal has resulted in decisions which are consistent and not in conflict between the several Federal Courts of Appeal.

Petitioners admit in their Petition, Pages 10-12 that with one exception Federal courts have construed such statutes as providing alternate means of acquiring right-of-ways over allotments. The one exception being Nebraska Public Power District v. 100.95 Acres, etc., 540 F.Supp. 592 (D Neb. 1982 now pending in the 8th Circuit). This Trial Court decision is in conflict with United States v. Minnesota, 113 F.2d 770 (8th Cir. 1940), and would not otherwise be grounds for review under the conflict of decision provision of Rule 17 of this Court.

Petitioners assert that the recent decision of this court, United States v. Clarke 445 U.S. 253 (1980) rested its decisions on grounds other than the continued effectiveness of 25 U.S.C. Sect. 357. However, in the opinion of Mr. Justice Rehnquist:

". . . We further believe that the word 'condemns' at least as it was commonly used in 1901, when 25 U.S.C. Sect. 357 was enacted, had reference to a judicial proceeding instituted for the purpose of acquiring title to private property and paying just compensation for it.

. . . . and since we hold that only in such a formal judicial proceeding, may land such as this be acquired, the complex, factual, and legal history of the dispute between the Government, respondents Glen M. Clarke, et al., and respondent, Bertha Mae Tabbytite, need not be recited in detail.
. . . . "

The effectiveness of 25 U.S.C. Sect. 357 continues to have a history of reaffirmance.

3. The decision of the 10th Circuit in this case does not conflict in principle with its earlier decision in Plains Electric Generation and Transmission Cooperative v. Pubelo of Laguna, 542 F.2d 1375 (10th Cir. 1976). The distinction in the factual situation of these two cases from the same circuit is clear and unmistakable. The Plains Case involved tribal lands held in communal ownership. As such, their use is of a public nature and subject to the

limited sovereignty of the Tribe. The decision of the 10th Circuit in this case written by Judge Seymour, clearly demonstrates the distinction between such lands and lands allotted in severallty to Indians and basically constitute private property.

The two decisions of the 10th Circuit does not constitute a departure from the accepted and usual course of judicial proceedings nor a sanction of such by a lower court so as to call for an exercise of this Court's power of supervision under its Rule 17.

4. The 10th Circuit did not misinterpret this Court's decision in ANDRUS v. Glover Construction Company, 446 U.S. 608 (1980).

Petitioners' theory of a partial repeal or "displacement" of Section 357, with 25 U.S.C. §§323-328, is not maintainable. The first provides for a taking by condemnation, without the consent

of the owner. The second requires consent by both the owner and the Secretary of Interior. Thus, if the consent provision is required, there could be no taking by condemnation. Under this theory, Section 357 would have to be totally invalidated. The 10th Circuit opinion was correct in rejecting the Petitioners' theory which follows this Court's opinion rather than misinterpreting it.

5. The United States did not breach its trust responsibilities.

Of the 110 Indian defendants in this case, 9 chose to attack taking in condemnation, on the theory of an implied repeal of 25 U.S.C. Sect. 357. The United States acting as Trustee, must follow the law even though 9 of the 110 defendants disagree with its interpretation. The opinion of the 10th Circuit is correct in its holding that there was no breach of

trust and the continued validity of Section 357 is in the best interest of Indians as demonstrated by the Government during oral argument.

CONCLUSION

For the reasons stated, the Court is respectfully is requested to deny a writ of certiorari.

Respectfully submitted,

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